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Nos. 82-1860 and 82-1862

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SCHNEIDER MOVING and STORAGE COMPANY,
Petitioner

and

PROSSER'S MOVING and STORAGE COMPANY,
Petitioner

v.

LORAN W. ROBBINS, MARION M. WINSTEAD, HAROLD J. YATES, ROBERT J. BAKER, HOWARD McDOUGALL, THOMAS F. O'MALLEY, and R. V. PULLIAM, Trustees of the Central States Southeast and Southwest Areas Pension Fund,
Respondents,

and

LORAN W. ROBBINS, MARION M. WINSTEAD, HAROLD J. YATES, ROBERT J. BAKER, HOWARD McDOUGALL, THOMAS F. O'MALLEY, and R. V. PULLIAM, Trustees of the Central States Southeast and Southwest Areas Health and Welfare Fund,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF ON THE MERITS FOR PETITIONER PROSSER'S MOVING AND STORAGE COMPANY

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QUESTIONS PRESENTED

Employee benefit funds established under Sec. 302(c) of the Taft-Hartley Act, 29 U.S.C. §186(c), are third-party beneficiaries to collective bargaining agreements. The question presented is:

May trustees of employee benefit funds sue an employer for breach of the collective bargaining agreement before exhausting the mandatory grievance and arbitration procedure set forth in the agreement where: (1) the claims of the trustees raise questions as to the meaning and application of the agreement, and (2) the agreement requires that such claims be resolved through the grievance and arbitration procedure.

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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF ON THE MERITS FOR PETITIONER PROSSER'S MOVING AND STORAGE COMPANY

OPINIONS BELOW

On November 7, 1980, the Honorable John K. Regan, United States District Judge for the Eastern District of Missouri,

Eastern Division, entered his order dismissing respondents' complaint, without prejudice, together with a memorandum of law in support of the order of dismissal. The unreported order, memorandum, and companion memorandum are reproduced in Prosser's Pet. Cert, Appendix at A.51, A.41 and A.46, respectively.

Respondents appealed to the United States Court of Appeals for the Eighth Circuit. On March 24, 1982, a split decision by a three-judge panel reversed the order of the district court and remanded the case for further proceedings consistent with the opinion. The opinions, which were not reported, are reproduced in Prosser's Pet. Cert. at A.27 and A.36. Thereafter, on June 4, 1982, the Court of Appeals granted petitioner's petition for rehearing *en banc,* as set forth in its unreported order reproduced in Prosser's Pet. Cert. at A.26.

On February 16, 1983, the Court of Appeals filed its *en banc* opinion in this cause, which has been reported at 700 F.2d 433 (8th Cir. 1983). The majority and dissenting opinions are reproduced in Prosser's Pet. Cert at A.1 and A.19, respectively.

JURISDICTION

The *en banc* judgment of the United States Court of Appeals for the Eighth Circuit was entered on March 14, 1983. (Prosser's Pet. Cert. A.24).

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) for review by Writ of Certiorari. The petition for Certiorari was filed on May 17, 1983, and granted on October 3, 1983, 52 U.S.L.W. 3230. A petition for Certiorari was also filed in the case of *Schneider Moving and Storage Co.* v. *Robbins, et. al.*, No. 82-1860, which was also granted on October 3, 1983, 52 U.S.L.W. 3230. The two cases have been consolidated.

STATUTES INVOLVED

This case involves Sections 203(d), 301(a) and 302(c)(5) of the National Labor Relations Act, 29 U.S.C. §§173(d), 185(a), 186(c)(5) (1976); Sections 2(b), 502, 514(d) and 515 of the Employee Retirement Income Security Act, as amended by the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§1001(b), 1132, 1144(d), 1145 (1980). These statutory provisions are set forth in the Appendix to the Brief on the Merits.

STATEMENT OF THE CASE

On March 19, 1980, the Trustees of the Central States Health and Welfare and Pension Funds[1] (hereinafter the "Trustees"), instituted suit against petitioner, Prosser's Moving and Storage Company (hereinafter "Prosser"), alleging that they were aggrieved because Prosser had violated the 1976[2] and 1979 collective bargaining agreements entered into with Local Union 610, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter the "Union"), and ancillary pension and health and welfare trust indenture agreements. The Trustees based jurisdiction of the district court on Section 301(a) of the Labor Management Relations Act of 1947 (LMRA), as amended, 29 U.S.C. §185(a) (1976), and on Section 502 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1132. (J.A.2, 41).

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[1] The Trust Funds were established pursuant to Section 302(c)(5) the Labor Management Relations Act of 1947, 29 U.S.C. §186(c)(5), (1976).

[2] Schneider Moving and Storage Co., in its Petition for Certiorari, has set forth the terms of the 1976 collective bargaining agreement agreed to by Prosser. All references to Prosser's 1976 collective bargaining agreement will be to Schneider's Petition for Certiorari (Sch.P.Cert.A.43-76). The 1979 agreement is reproduced in the Joint Appendix at 49-91.

The Trustees complaint alleged that each collective bargaining agreement provided for specific payments to the two trust funds "for each employee covered by said [a]greement." (J.A. 44). They sought: (1) an accounting as to *all* employees of Prosser "covered by the collective bargaining agreement" dating back to March 1, 1976; (2) recovery of all sums of money determined to be due after the completion of the accounting, together with interest thereon; (3) specific performance by Prosser to provide the Trustees with monthly contribution reports; (4) costs attendant to conducting an audit of Prosser's payroll books and records; (5) reasonable attorney's fees; and (6) such other relief as the court deemed just. (J.A.48-49).[3]

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[3] The terms of the Pension Indenture and the Health and Welfare Indenture are identical in every respect pertinent to this case. Only the Pension Indenture is reproduced in the Joint Appendix. (J.A. 14-33). Both Trust Indentures require the employer to make contributions on behalf of its employees as required by the applicable collective bargaining agreement between the union and the employer. (J.A. 15,21). The trust documents define an employee as a person who is: (1) "employed under the terms and conditions of a collective bargaining agreement" and (2) "on whose behalf payments are required by such collective bargaining agreement ... to be made to the Fund by the Employer." (J.A.16).

The trust documents permit the Trustees to obtain from an employer (1) the names, addresses and social security numbers of its "Employees", (2) the hours worked and past employment history, and (3) such other information deemed necessary for the proper administration of the trust. (J.A.22-23).

Further, the trust documents permit the Trustee to "take such steps, including the institution and prosecution of, and intervention in, any legal proceedings as the Trustees in their discretion deem in the best interest of the Fund to effectuate the collection or preservation of contributions or other amounts which may be owed the Trust Fund, without prejudice, however, to the rights of the Union to take whatever steps which may be deemed necessary for such purpose." (J.A.22).

Prosser, by its answer, denied the Trustees' allegations, particularly their interpretation of provisions of the collective bargaining agreements, and contended the district court lacked subject matter jurisdiction. (J.A.92-93) Prosser moved to dismiss the complaint on grounds that the matters raised by the complaint involved interpretation of various provisions of the underlying collective bargaining agreements and were, therefore, subject to the grievance and arbitration procedure set forth in the agreements[4] (J.A.92-95). Prosser further contended that because the grievance and arbitration procedure had not been undertaken, the court lacked subject matter jurisdiction and the complaint failed to state a claim upon which relief could be granted. (J.A.92,93,95).

Prosser's motion to dismiss was premised on the necessity for interpretation of the collective bargaining agreements in two specific areas: first, the determination of which employees were entitled to participation in the benefit plans for which the Trustees sought contributions; and, second, the scope of the Trustees' administrative authority under the agreements between Prosser and the Union.

On the first issue, the underlying collective bargaining agreements did not require that Prosser make contributions for *all* employees, but only for those determined to be "regular employees" as defined in those contracts. Under the agreements, contributions to the Health and Welfare Fund for "temporary" and "emergency" employees were expressly ex-

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[4] Both collective bargaining agreements provided for grievance and arbitration of disputes between Prosser and the Union or any employee "as to the meaning or application of the provisions of this agreement." (Sch.P.Cert. A.51 & J.A.55). Both agreements provided for a three-step grievance procedure culminating in binding and final arbitration. Under the 1979 agreement, if a dispute arose over Prosser's failure to make contributions to the Trust Funds, the Union could either use its economic power to support its demands or submit its dispute to final and binding arbitration with Prosser. (J.A.56).

cluded (Sch.P.Cert. A.63 & J.A.77), and "temporary", "emergency" and "part-time" employees were excluded from that category of employees for whom contributions to the Pension Fund were required. (Sch.P.Cert. A.65 & J.A.79). The agreements also differentiated casual and seasonal employees from "regular" employees but did not specifically provide whether contributions to the Funds should be made on their behalf. (Sch.P.Cert. A.61 & J.A.61). Prosser asserted that these classifications of its employees required interpretation of the various categories of employment set forth in the collective bargaining agreements and was, therefore, subject to the agreements' grievance and arbitration procedure. (J.A. 93).

Secondly, Prosser also claimed that utilization of the grievance and arbitration procedure was necessary to determine the scope of the Trustees' administrative authority with respect to the following issues raised in the complaint:

(1) Whether the Trustees have the right to demand inspection of the employment records of "all employees covered by the collective bargaining agreements," including those categories of employees for whom contributions are expressly excluded; (J.A.92)

(2) Whether the trustees have the right to seek to recover contributions, and to inspect records, pertaining to the period prior to February 28, 1979, when the Union and Prosser entered into a new collective bargaining agreement in reliance upon their understanding and interpretation of the prior agreement and the manner in which contributions were made pursuant thereto; (J.A.94-95) and

(3) Whether the trustees have the right to seek to recover contributions, and to inspect records, prior to January 4, 1978, since on that date a Union complaint to the National Labor Relations Board, alleging Prosser's refusal to allow an audit of

its records, was dismissed due to the Union's refusal to arbitrate. (J.A.93,94 & 108)[5]

The district court sustained Prosser's motion and dismissed the case without prejudice pending the outcome of arbitration proceedings. (Prosser Pet.Cert. A.51). In its opinion, the court held that the dispute raised in the Trustees' complaint:

> involves the construction and interpretation of the language of the collective bargaining agreements as to which class of employees are covered thereunder and as to the right of each set of plaintiffs to obtain a court-ordered accounting and audit. (Prosser Pet.Cert.44-45)

The court also held:

> that unless and until there has been a determination of the disputes relating to the rights of the plaintiffs and the nature and extent of the defendant's obligations under the collective bargaining agreement, the plaintiffs have no standing to sue as alleged third-party beneficiaries. (Prosser Pet.Cert.45)

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[5] The trustees derived their authority from the following provision in both collective bargaining agreements, which Prosser claimed needed to be interpreted through the grievance and arbitration procedure:

> "By the execution of this Agreement, the Employer authorizes the Employers' Associations which are parties ... [hereto] to enter into appropriate trust agreements necessary for the administration of such fund and to designate the Employer Trustees under such agreement, hereby waiving all notice thereof and ratifying all actions already taken or to be taken by such trustees within the scope of their authority." (Sch. Pet. Cert. A.62,64 & J.A.76,78).

Prosser contended that in each of the three instances enumerated above, the Trustees' actions and demands, within the meaning of the foregoing provision, constituted extraordinary matters not "necessary for administration of the fund" and beyond "the scope of their authority."

The district court's decision that litigation of the Trustees' claims must be deferred until the questions of interpretation have been resolved under the grievance and arbitration procedure of the contracts was limited to instances where disputes arising out of an interpretation of the contract language were involved. The court noted that not all collection claims must be processed through the grievance and arbitration procedure and that "*mere* collection matters" are not subject to arbitration. (Prosser Pet.Cert. A.50)

The Trustees of the Pension Fund[6] appealed to the United States Court of Appeals for the Eighth Circuit, which assumed jurisdiction of the appeal pursuant to 28 U.S.C. Sec. 1291. On March 24, 1982, a divided three-judge panel reversed the district court, holding the Trustees could sue without resorting to arbitration. (Prosser Pet.Cert. 27). On April 7, 1982, Prosser filed its petition for rehearing *en banc,* which was granted on June 4, 1982 (A.26). Oral argument was held on October 13, 1982.

On February 16, 1983, the court's *en banc* decision also reversed the district court, with the majority holding that the Trustees did not have to defer their litigation pending arbitration between the Union and Prosser of the underlying contract disputes. (Prosser Pet.Cert. A.1) Senior Circuit Judge Henley wrote a strong dissenting opinion, joined by Judge John R. Gibson. (Prosser Pet.Cert. A.19).

SUMMARY OF ARGUMENT

I. The Central States Southeast and Southwest Areas Pension and Health and Welfare Funds are third-party beneficiaries to the collective bargaining agreement. The Trust Funds take their

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[6] Although the Trustees of both the Pension Fund and the Health and Welfare Fund were the same individuals, only the Trustees of the Pension Fund appealed the decision rendered in favor of Prosser. See notice of appeal Prosser Pet. Cert. at A.41.

rights, duties and obligations subject to the terms of the collective bargaining agreement from which they derive their benefits. The Trustees have filed suit in federal court seeking an audit of Prosser's payroll records kept on *all* employees within the collective bargaining unit. The Trustees' litigation is premised on an interpretation of the collective bargaining agreements. The Trustees' interpretation of the scope of their administrative authority and the breadth of Prosser's obligations under the collective bargaining agreements, is open to legitimate dispute. The collective bargaining agreements unequivocally provide that disputes as to the meaning of the collective agreements will be submitted to the grievance and arbitration procedure for resolution. Arbitration is a condition precedent to the right of the Trustees to bring suit. The failure of the Trustees to exhaust the grievance and arbitration provision of the agreements is a direct defense to the Trustees' action. *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960) and *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72 (1982).

II. Prosser and the Union are under a congressional mandate to collectively bargain in good faith over the issue of employee benefits. For over two decades, Prosser has made contributions on behalf of its regular employees to the Trust Funds, as required by the collective bargaining agreements. As a part of the continuing collective bargaining process, the Union and Prosser are obligated to police and enforce the terms of the collective bargaining agreement. The Union and Prosser have, in clear terms, reserved for themselves the right to settle disputes regarding the meaning of the collective bargaining agreements by the exclusive use of the grievance and arbitration provision of the contract. The right of the parties to decide for themselves the exclusive method by which disputes will be settled is firmly grounded in congressional command and judicial precedent strongly favoring arbitration of labor disputes. Section 203(d) LMRA, 29 U.S.C. §173(d). *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960). Deferral of the Trustees' litigation, pending arbitration of the underlying contract disputes,

will foster industrial peace, preserve the integrity of the collective bargaining process, *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650 (1965), and further the goals of judicial economy and restraint. *Barrentine* v. *Arkansas-Best Freight System,* 450 U.S. 728, 746 (1981).

III. The duties and rights of the Trustees to administer the Trust Funds free from the domination and control of the Union and Prosser are certain. Section 302(c)(5) LMRA. The disputes intended to be arbitrated are limited to procedural issues and an interpretation of the categories of employees set forth exclusively in the collective bargaining agreements. Settlement of these disputes is beyond the scope of the Trustees' administrative and fiduciary duties, and poses no threat to the independence of the Trustees. *NLRB* v. *Amax Coal Co.,* 453 U.S. 322 (1981) and *Central States Southeast and Southwest Funds* v. *Central Transport, Inc.,* 698 F.2d 802 (6th Cir. 1983), *petition for cert. filed.* If the Union fails to comply with the requests of the Trustees to arbitrate the disputes, the Trustees will be shielded from liability.

Neither text of the Employee Retirement Income Security Act of 1974, nor the Multiemployer Pension Plan Amendments Act of 1980, or the legislative history indicates an intention of Congress to repeal the labor laws which might be raised as a defense to a proviso in the collective bargaining agreement requiring an employer to contribute to an employee benefit fund. Section 514(d) ERISA, 29 U.S.C. §1144(d)(1975); *Kaiser Steel Corp.* v. *Mullins,* 455 U.S. 72, 88 (1982). Congress did not intend to compromise the integrity of the collective bargaining process, and the attendant right of the parties to settle their disputes under the agreement by arbitration. To the contrary, Congress relies upon the collective bargaining process to expand employee benefits beyond the minimum requirements of the law. Requiring Trustees to defer litigation, pending arbitration of the underlying contract disputes, will foster the continued growth of the private employee benefit system, and give full accord to Congress' intent to leave the collective bargaining process intact.

I. THE EIGHTH CIRCUIT ERRONEOUSLY EXPANDED THE HOLDING OF THIS COURT IN *LEWIS* v. *BENEDICT COAL CORP.* TO PRECLUDE THE DEFENSE OF EXHAUSTION OF CONTRACTUAL REMEDIES.

Employee benefit funds established under Sec. 302(c)(5) of the Taft-Hartley Act, 29 U.S.C. § 186(c)(5)(1976), are third-party beneficiaries to collective bargaining agreements.

Under general contract law, a third-party beneficiary takes its rights, duties, and obligations subject to the terms of the underlying agreement from which it derives its benefits. *Rotermund* v. *United States Steel,* 474 F.2d 1139 (8th Cir. 1973). Therefore, the promissor may "usually assert against the beneficiary any defense which he could assert against the promissee if the promissee were suing on the contract." Calamari & Perillo, *Contracts,* 623 (2nd ed. 1977) (footnote omitted).

Failure to attempt to exhaust mandatory grievance and arbitration provisions constitutes one such defense to an action brought under Sec. 301 of LMRA, 29 U.S.C. § 185 (1976) for breach of a collective bargaining agreement. *DelCostello* v. *International Brotherhood of Teamsters,* 103 S.Ct. 2281 (1983); *Hines* v. *Anchor Motor Freight, Inc.,* 424 U.S. 554 (1976); *Vaca* v. *Sipes,* 386 U.S. 171 (1967). Since the decision in this case by the Eighth Circuit Court of Appeals, the status of this defense is in doubt.

In *Central States, Southeast and Southwest Areas Pension Fund* v. *Howard Martin,* 625 F.2d 171 (7th Cir. 1980), a trust fund sued to collect contributions allegedly due from an employer under a collective bargaining agreement. As in the present case, the employer denied that contributions were owed and contended: (1) that the language of the collective bargaining agreement was open to dispute as to which workers were covered by the contribution provisions of the agreement; (2) that the dispute was subject to the broad arbitration provision of the agreement; and (3) that the court therefore lacked subject

matter jurisdiction because of the failure to submit the matter to arbitration.

The Seventh Circuit held that trustees are not required to arbitrate disputes over delinquent payments. But the court found that the case was not a *simple collection* matter. Rather, the case turned on an arbitrable issue of contract interpretation which, until resolved by arbitration, precluded determination of any claimed delinquency. To the trustees' objection that they had no access to the arbitration process, the court responded:

> The argument falls of its own weight, however. To trigger the arbitration process, the Funds need only inform the Union, the members of which the Funds exist to serve, that Martin disputes the coverage of certain workers and ask the Union, the organization of primary interest, to file a grievance against Martin.

Id. at 173

In *Trustees of National Benefit Fund, Etc.* v. *Constant Care Community, Etc.*, 669 F.2d 213 (4th Cir. 1982), the Fourth Circuit adopted the *Howard Martin* analysis. However, the court refused to defer litigation in that case because the employer did not raise any substantive contractual defenses which were subject to resolution by arbitration.[7]

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[7] *Howard Martin* has also been cited with approval by the Ninth Circuit Court, in *Laborers Health and Welfare Trust Fund* v. *Kaufman & Broad*, 707 F.2d 412 (9th Cir. 1983). Further, at least one district court has held it appropriate to defer litigation until the collective bargaining disputes are resolved by arbitration. IBEW v. *Dave's Electric Service, Inc.*, 382 F.Supp. 427 (M.D.Fla. 1974), *remanded on other grounds*, 545 F.2d 987 (5th Cir. 1977). Prior to its decision below, the Eighth Circuit had cited *Howard Martin* and *Dave's Electric* with approval in considering issues similar to those involved in the present case. *See Layne-Western Co.* v. *International Union Operating Engineers, AFL-CIO Local Union 513*, 650 F.2d 155, 158 (8th Cir. 1981) and *Farmer* v. *Fisher*, 586 F.2d 1226, 1230 (8th Cir. 1978).

In a divided opinion in the present case, the Eighth Circuit Court of Appeals rejected the *Howard Martin* analysis. The court carved out a significant exception to the right of union and employer to select the method by which disputes as to the meaning of their collective bargaining agreement must be settled. Premised on a perceived need to free trustees from control by both union and employer, the court held that trustees of employee benefit plans may sue an employer without deferring to arbitration, even when the dispute involves issues of contract interpretation. (Prosser Pet.Cert. 2, 19)

The split of authority on this issue begins with diverging opinions on the meaning and breadth of the decision in *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960). In *Lewis,* trustees of a pension fund sued to collect royalties payable under a collective bargaining agreement. The employer defended by alleging a breach of the bargaining agreement due to the union's violation of the no-strike clause, and sought to setoff the resulting damages incurred by the employer against delinquent contributions *admittedly owed* to the trust fund. The Court found: (1) the employer shares an interest in the well being of the trust fund; (2) the setoff could result in higher royalties to innocent employers; (3) the employer had an adequate remedy against the union; and (4) there is a strong congressional policy protecting union members and beneficiaries from damages caused by the actionable wrongs of their union. The Court held that the claims against the union could not be used as a setoff against the amounts owed to the trust funds, absent unequivocal language in the collective bargaining agreement that the union's promise not to strike was a condition precedent to the employer's obligation to make contributions to the trust fund.

Courts which have held that trustees have a right to direct litigation have relied on *Lewis* as the basis for an expanded proposition that, absent unequivocal language to the contrary, trustees are not bound to defer litigation pending arbitration of

the underlying contract disputes.[8] *Lewis,* however, is not dispositive of the issues presented in this case.

IBEW v. *Dave's Electric Service, Inc.,* 382 F.Supp. 427 (M.D.Fla. 1974), held that the arbitration provisions of a collective bargaining agreement were applicable to a trustee's claims for delinquent health and welfare benefit contributions. Judge Hodges examined the reasons given for the decision in *Lewis* and determined:

> the reasons offered by the Court in *Lewis* for rejecting the use of a *substantive* defense or counterclaim in an action by the trustees are not at all applicable to the situation posed here—the use of the *procedural* defense of arbitration. Absent a clear showing of intent to the contrary, the *Lewis* Court would not assume the parties intended to allow certain union action to subvert the trustees' substantial rights under the agreement. *Requiring arbitration, of course, will not subvert any rights* [emphasis added]...The trustees will still have all substantive rights to which they are entitled under the collective bargaining agreement.

Id. at 433.

In *Howard Martin,* the Seventh Circuit also analyzed the holding in *Lewis* and refused to extend it, stating:

> In *Lewis,* however, the employer's liability for payments to the fund was conceded...no arbitration clause was

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[8] *Robbins* v. *Prosser* (A.19) and *Bugher* v. *Consolidated X-Ray Service Corp.,* 705 F.2d 1426 (5th Cir. 1983) *Pet. Cert. pending.* See also, *Boyle* v. *North Atlantic Coal Corp.,* 331 F.Supp. 1107 (W.D.Pa. 1971); *Wishnick* v. *One Stop Food & Liquor Store, Inc.,* 359 F.Supp. 243 (N.D. Ill. 1973); and *Todd* v. *Casemakers, Inc.,* 425 F.Supp. 1375 (N.D.Ill. 1977), which have been frequently cited for the general proposition that trustees need not exhaust the arbitration procedure. However, in these cases it appears that claimed contributions were admitted to be delinquent and there were no questions of contract interpretation for the arbiter to decide.

> present in the contract or discussed by the court. Whether the Funds' special third party status would require a specific provision entitling an employer to set-off payments admittedly owed is irrelevant here, where the existence of the obligation to make certain payments depends upon interpretation of the contract and the contract specifically requires arbitration on questions of interpretation.

625 F.2d at 172.

Until recently, whether *Lewis* was to be read to bar an employer from raising all defenses based on the contract was undecided. In *Kaiser Steel Corp.* v. *Mullins,* 455 U.S. 72 (1982), the Court held that a coal producer, when sued on its promise to contribute to a union welfare fund based on its purchase of coal from producers not under contract with the union, is entitled to plead and have adjudicated the defense that the promise is illegal under the anit-trust and labor laws. The Court rejected the trustees' reliance on *Lewis* as authority for disposing of the issue in the case. The Court reasoned that because: (1) there was strong public policy against enforcing illegal contracts; (2) there was a lack of legislative intent or history to abrogate the defense of illegality; and (3) the defense of illegality related directly to the employer's promise to pay contributions to the trust fund, these defenses could be asserted against the claims of the third-party beneficiary trustees.

Both *Lewis* and *Kaiser* equally support Prosser's position that: (1) the collective bargaining agreements unequivocally state that disputes as to the meaning of the agreement will be submitted to the grievance and arbitration procedure for resolution; (2) arbitration is a condition precedent to the right of third-party beneficiaries to bring suit; and (3) failure to exhaust the grievance and arbitration provision of the agreements is a direct defense to the Trustees' action.

In a collective bargaining agreement, the promise to abide by the grievance procedure is inextricably linked to the substantive

rights and duties promised in the contract. The grievance procedures are part and parcel of the bargaining process upon which the meaning and intent of the parties is determined. In a real sense, the parties' rights and duties are not ascertainable until after the dispute is disposed of by settlement of a grievance or an arbitrator's decision. In this case, unless and until the Union successfully prosecutes the grievance, there is no breach of the contract for which the Trustees can sue. In such cases, arbitration is a condition precedent to suits brought by trustees which are predicated upon an interpretation of the meaning of a collective bargaining agreement. *Lewis, supra.*

In *Kaiser* v. *Mullins,* the Court was concerned by the equity of allowing an employer, who admittedly failed to make contributions, to assert the defense of "illegality" against the benefit fund trustees who were guilty of no wrong doing. Likewise, in *Lewis* v. *Benedict Coal Corp.,* 361 U.S. 459 (1960), the Court was concerned with punishing the innocent trust beneficiaries for the wrongs of the union and therefore the Court refused to allow damages caused by the union to be set off against amounts owed the trust fund.

But the Prosser case does not present any similar problem. The Trustees, as third-party beneficiaries to the collective bargaining agreements, derive their rights and duties from those contracts and the trust instruments. In agreeing to act as trustees, they implied a promise to abide by the terms of the agreements. The Trustees' attempt to litigate disputes without resorting to arbitration is beyond the scope of their authority and is a breach of their promises to the Union and Prosser. The requirement to arbitrate contract disputes is a direct defense to such misconduct by the Trustees.

Most importantly, requiring the Trustees to defer litigation pending arbitration will not subvert the rights of the trust participants and beneficiaries, but will merely "change the initial forum in which those rights are determined to the preferred forum as a matter of national labor policy and the selected

forum by the terms of the agreement itself." *IBEW* v. *Dave's Electric Service, Inc.*, 382 F.Supp. 427, 433 (M.D.Fla. 1974).

II. DEFERRAL TO ARBITRATION IS CONSISTENT WITH THE REQUIREMENTS OF THE COLLECTIVE BARGAINING AGREEMENTS AND THE STRONG NATIONAL POLICY FAVORING ARBITRATION.

A. The Agreements And Conduct Of The Parties Evidence An Intent To Arbitrate.

The Collective Bargaining Agreements:

Under the collective bargaining agreements, the Union is the exclusive bargaining agent for the employees covered by the agreements, and the agreements are declared to be the entire "agreement between the parties as to rates of pay, wages, hours of work, conditions of employment and such other matters", including contributions to the health, welfare and pension funds. (Sch. P. Cert. A. 44-45 & J.A. 51.)

For the life of the agreements, Prosser is obligated to make payments to the Trust Funds in accord with the provisions of the bargaining agreements. The contracts set forth the rate of contributions to the Trust Funds and the obligation to make contributions on behalf of each "regular employee" as defined in the agreements. (Sch. P. Cert. A. 62-65 & J.A. 76-79). Both agreements exclude contributions to the Health and Welfare Fund on behalf of "temporary" or "emergency" employees (Sch. P. Cert. A. 63 & J.A. 77). Comparably, both agreements exclude contributions to the Pension Fund for employees who work less than twenty-five hours per week (with exception for "a regular employee") or who work "part-time, temporarily or in the case of an emergency." (Sch. P. Cert. A. 65 & J.A. 79).

The health and welfare and pension provisions of these agreements further provide that Prosser, by executing the agreements, authorizes its representatives to enter into trust

agreements *necessary for the administration* of the funds and ratifies the actions taken by the Trustees acting "within the scope of their authority." (Sch. P. Cert. A. 62, 64 & J.A. 76, 78). Additionally, Prosser is required to post a roster of regular employees (with dates of their employment) on its billboard at all times (Sch. P. Cert. A.50) and, under the 1979 agreement, is required to send an updated seniority list to the Union every six months. (J.A. 57) If a grievance arises regarding Prosser's duty to make contributions to the Trust Funds on behalf of a specific employee, or if by an independent audit the Union has "reason to believe that the contract has [sic] or is being violated", the Union has a right to inspect payroll records for employees covered by the agreements. (Sch. P. Cert. A.71-72 & J.A. 82-83).

The collective bargaining agreements provide in broad, unequivocal language that "should differences arise between the Company and the Union or an employee of the Company as to the meaning or application of the provisions of this agreement such differences" shall be resolved in accord with the grievance and arbitration provision of the contracts. (Sch. P. Cert. A. 51 & J.A. 55). The 1979 agreement provides, that in the event of a dispute involving Prosser's failure to make contributions to the Trust Funds, the Union, in its discretion, may either use its economic power to support its demands or submit its dispute to final and binding arbitration with Prosser.*

The Trust Indentures:

The Trustees acknowledge receipt of the collective bargaining agreements (J.A. 89), and agree to hold in trust for "employees", the sums of money contributed pursuant to the

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* For the reason that the disputes in this case arose after the termination of the 1976 collective bargaining agreement, the provision set forth in the 1979 agreement for settlement of disputes would most likely be the procedure to be followed by the parties.

"terms" of the collective bargaining agreements. (J.A. 15, 21). An "employee" is defined in the trust agreements as "[a] person who is employed under the terms and conditions of a collective bargaining agreement...and on whose behalf payments are required by such collective bargaining agreement...to be made to the Fund by the Employer" (J.A. 16). The trust agreements allow the Trustees to obtain from contributing employers: (1) the names, addresses and social security numbers of its "employees"; (2) the hours worked by each employee and past industry employment history; and (3) such other information as the Trustees may reasonably require in the administration of the trusts. Further, the Trustees may, by their representatives, examine the pertinent records of each employer whenever the examination is deemed advisable by the Trustees for the proper administration of the trusts. (J.A. 22).

Additionally, the trust indentures purport to grant power to the Trustees to "demand and collect the contributions of the Employers to the Fund" and authorize the Trustees to take such steps, "including the institution and prosecution of, and intervention in, any legal proceedings as the Trustees in their discretion deem in the best interest of the Fund to effectuate the collection or preservation of contributions or other amounts which may be owed to the Trust Fund, *without prejudice, however, to the rights of the Union to take whatever steps which may be deemed necessary for such purpose.*" (emphasis added) (J.A. 22)

The Agreements Read Together:

It is clear that without the collective bargaining agreements, there would be nothing for the Trustees to enforce against Prosser. Only by referring to the collective bargaining agreements can it be determined what amounts and under what conditions Prosser has agreed to contribute to the Trust Funds. Likewise, the scope of authority of the Trustees to inspect the records of Prosser's "employees" (i.e. a person covered by the collective

bargaining agreements and on whose behalf contributions are to be made) is dependent upon an interpretation of the bargaining agreements.

The agreements must be read in harmony with one another. The Union and Prosser have, in clear terms, reserved for themselves the right to determine disputes about the meaning of the collective bargaining agreements by use of the grievance and arbitration provision of the contracts. The Union is the exclusive bargaining representative of the employees covered by the agreements and Prosser is specifically prohibited from negotiating or making collective bargaining agreements with others. The agreements constitute the entire agreement between the Union and Prosser concerning contributions to the Trust Funds. To allow the Trustees to litigate directly with Prosser the meaning and application of the terms of the collective bargaining agreements, to the exclusion of the Union, is to ignore the plain, unequivocal and mandatory language of the bargaining agreements.

Instead, the agreements must be read to allow the Trustees to proceed with their suit only after the Union and Prosser have had an opportunity to arbitrate the underlying contract disputes. Such an interpretation gives meaning to the provision for arbitration set forth in the collective bargaining agreements and the provision for litigation set forth in the trust agreements.

This interpretation is further buttressed by comparing the unequivocal language of the collective bargaining agreements requiring settlement of disputes by the grievance procedures, with the ambiguous language of the trust agreements, allowing the trustees to institute suit "without prejudice" to the union. "Without prejudice" must be interpreted to mean that the Trustees may not litigate with Prosser, to the exclusion of the Union, the meaning of the collective bargaining agreements, for such litigation would prejudice the Union's position as the exclusive bargaining representative of its members and threatens

its right to have its contract honored. *See, W. R. Grace & Co.* v. *Local Union 759,* 103 S.Ct. 2177 (1983).

The Conduct Of The Parties:

Deferral of trust litigation pending arbitration is consistent with the collective bargaining history and the conduct of the parties. The relationship between Prosser and the Union predates the collective bargaining agreements at issue in this case. Since 1961 Prosser has made contributions to the Pension Funds in accord with the terms of collective bargaining agreements then in effect. For over 20 years the Union and Prosser have bargained in good faith regarding the pension and welfare benefits of employees. Two prior disputes have arisen over Prosser's contributions to the Trust Funds and, in each case, it was the Union, not the Trustees, who claimed the right to enforce the terms of the collective bargaining agreements. (J.A. 99-108).[10]

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[10] On May 26, 1976, the Union filed a lawsuit against Prosser in the United States District, E.D.Mo., Cause No. 76-482(C), claiming Prosser to be delinquent in contributions due the Health & Welfare Fund from March 1, 1973 through February 28, 1976 in an amount not less than $905.65, and delinquent in contributions to the Pension Fund in an amount not less that $977.84. The Union prayed for an audit and accounting of Prosser's books and records. Prosser, without posing any defenses, settled the Union's lawsuit, which was dismissed by the Union without prejudice in September 1976.

The second dispute arose during the life of the 1976 collective bargaining agreement. On April 19, 1977, the Union made a demand upon Prosser for an audit of the company's payroll records to determine if a violation of the contract existed with regard to providing its employees with seniority and other benefits provided by the contract. After Prosser refused the Union's request, the Union filed an unfair labor practice charge with the National Labor Relations Board (NLRB) by reason of the company's refusal to allow an audit of its records. The NLRB deferred ruling on the complaint pending arbitration of the dispute between the Union and Prosser. After the Union informed the NLRB that it did not intend to invoke the contractual provisions providing for arbitration the complaint was dismissed on January 4, 1978. (J.A. 99-108).

B. Arbitration Of The Underlying Contract Disputes Is Consistent With The Strong National Labor Policy Favoring Arbitration.

The intent of the parties to submit contract disputes to arbitration is consistent with the national labor policy stated by Congress and developed by the federal courts.

The federal policy favoring arbitration to resolve labor disputes is firmly grounded in congressional command. Section 203(d) of the Labor Management Relations Act, 1947, (LMRA) 29 U.S.C. Sec. 173(d), provides in part:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. (A.1)

As a matter of federal labor policy, arbitration is encouraged as a positive mechanism to foster peaceful industrial relations. *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). As stated by the Court in *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. at 584-585:

> In the absence of an express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad.

The Eighth Circuit Court of Appeals majority implies that because the Trustees were non signatories to the collective bargaining agreement they never contracted to arbitrate the disputes. While it is true that the Trustees were non signatories, it can hardly be argued that the Trustees, as third-party

beneficiaries to the collective bargaining contracts, did not accede to the agreements of the Union and Prosser to exclusively settle their contract disputes by arbitration. *cf. John Wiley & Sons* v. *Livingston,* 376 U.S. 543 (1964).

More critical, however, is the Court of Appeals majority's suggestion that arbitration of the contract disputes in this case cannot be justified on the basis of the traditional reasoning which supports the strong national labor policy favoring arbitration. On this point, Judge Henley responded, in his dissent:

> Today the court makes bad law...and erodes the pronouncements of the Supreme Court in the *Steelworkers Trilogy.* Its decision may be perceived as doing disservice to the national policies of maintaining industrial peace, avoiding delay and deferring to the expertise of persons acquainted with industry standards and the law of the shop. (footnotes omitted, Prosser Pet.Cert.A.20).

Arbitration is strongly favored because it is a mechanism to foster stability in industrial relations. As noted by the majority below, "[t]he arbitration and the 'no strike' clause are generally each *quid pro quo* for the other." (Prosser Pet.Cert. A.7). The court, without deciding, appears to accept an argument previously advanced by the Trustees: that because the Trustees cannot call for a strike, actions by the Trustees will in no way disrupt industrial peace. The question of whether the Trustees can call a strike is not the issue, however.[11]

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[11] While it is true that Trustees do not have authority to call a strike, it is naive to think their actions will not have an influence on the Union. *See, e.g., Layne-Western Co.* v. *International Union Operating Engineers,* 650 F.2d 155 (8th Cir. 1981), where after an audit by the trustees, the trustees brought suit to collect the claimed delinquencies and the union went out on strike. The court held the union was required to arbitrate with the company the underlying contract disputes which were raised in the trustees' suit. Reversed by *Robbins* v. *Prosser.* (Prosser Pet. Cert. A.2).

The question of industrial peace is much larger and more subtle than the question of strikes. It is the entire collective bargaining process, of which arbitration is part and parcel, that contributes t industrial stability. *Steelworkers* v. *Warrior & Gulf Nav. Co., supra.* The test for industrial peace is whether the dispute will substantially affect further relationships between the employer and the employees. The Trustees seek to deprive the Union and Prosser of their statutory and contractual right to establish a uniform and exclusive method for settling their disputes. A rule permitting the Trustees to litigate directly with Prosser, to the exclusion of the Union, will "inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements". *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650, 653, (1965), quoting from *Local 174, Teamsters etc.* v. *Lucas Flour Co.,* 369 U.S. 95, 103 (1962).

If arbitration is required to interpret a collective bargaining agreement for certain purposes but not for others, the Union and Prosser could easily be subjected to inconsistent or conflicting obligations owed to one another under the agreement. The Court of Appeals panel majority, while acknowledging the dangers of these inconsistencies, dismissed them as minimal. (Prosser Pet. Cert. A.35). This assumption exposes employers such as Prosser to grave risk. In light of the Court's holding in *W.R. Grace & Co.* v. *Local Union 759, etc.,* 103 S.Ct. 2177 (1983), it is clear that if the Trustees are allowed to proceed without deferring the matter to arbitration, Prosser will be forced to litigate these disputes at its own risk, while, whatever the outcome, the Union's right to arbitrate the same dispute will remain intact. *Id.* at 2186.

As noted by Judge Henley in his dissent:

> One need not be clairvoyant to forsee that the spirit of negotiation and compromise that forms the basis for such agreements might be seriously compromised if the parties become aware that the terms of the agreements might be

> safely ignored or interpreted initially other than through the arbitration machinery. (Prosser Pet. Cert.A.23).

Clearly, Prosser would be unwise to enter into a collective bargaining agreement which exposes the company to such dangers.

Industrial peace will also be served by deferring to the expertise of an arbitrator familiar with the "law of the shop". The disputes to be arbitrated in this case[12] are typical labor disputes involving procedural and coverage issues under the contract.[13] They are well suited for arbitration. The arbitrator will be called upon to determine whether an employee is "part-time", "temporary" or "emergency" in light of the contract provisions, previous bargaining history of the parties, and the custom and practice of the moving and storage industry. *See Transportation-Communication Employees Union* v. *Pacific Railroad Co.*, 385 U.S. 157, 160-61 (1966) and *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596-597 (1960).

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[12] The issues to be arbitrated by Prosser and the Union are set forth at 6 supra.

[13] Courts have traditionally held that the procedural questions presented by Prosser are arbitrable: *See, e.g., International Union of Operating Engineers* v. *Flair Builders, Inc.*, 406 U.S. 487 (1972), (issue of whether union was barred by laches from enforcing the collective bargaining agreement, held arbitrable); *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 557 (1964), (holding that "procedural questions which grow out of the dispute and bear upon its final disposition should be left to the arbitrator"); *Bressette* v. *International Talc Co.*, 527 F.2d 211 (2d Cir. 1975), (factual issue of intent of the parties to include or exclude arbitration of obligations under the separate pension plan, held to require arbitration); *Local 542 International Union of Operating Engineers* v. *Penn State Construction, Inc.*, 356 F.Supp. 512 (M.D. Pa. 1973), (issue of alleged union waiver of right to arbitration, held arbitrable); *General Warehousemen and Employees Union 636* v. *American Hardware Supply*, 329 F.2d 789 (3rd Cir.1964), (issue of union's waiver of arbitration, on account of late filing and receipt of severance pay for its members, held proper subject for arbitration).

(footnote continued on next page)

The arbitrator will determine whether or not contributions are owed, not under the law, but rather under the terms of the collective bargaining agreements, which are more liberal than the requirements of the law.[14] An arbitrator familiar with the custom and practice of the moving and storage industry will be able to efficiently, expeditiously and properly determine on whose behalf Prosser has agreed to make contributions. (Prosser Pet. Cert. A. 22, Henley & Gibson, JJ., dissenting). *See, e.g. Gateway Coal Company* v. *United Mine Workers of America,* 414 U.S. 368, 377-379 (1974).

(footnote 13 continued)

Likewise, courts have held disputes involving employee benefits arbitrable. *See, e.g., United Steelworkers* v. *General Steel Industries,* 499 F.2d 215 (8th Cir. 1974), (status of employees and their rights to benefits under the separate insurance and pension plans, held to require arbitration); *Builders Ass'n. of Kansas City* v. *Greater Kansas City Labor D.C.,* 326 F.2d 867 (8th Cir. 1972), (impasse over the terms to be included in the trust agreement, held to require arbitration); *United Steelworkers* v. *Mesker Bros. Industries, Inc.,* 457 F.2d 91 (8th Cir. 1972), (procedural questions, along with disputes as to the adequateness of insurance coverage, held to be arbitrable); *United Steelworkers* v. *Crane Co.,* 456 F.Supp. 385 (W.D.Pa.1978), (dispute over apportionment between two employers, of pension contribution amounts due on behalf of an employee as provided by ERISA, held to require arbitration); *United Rubber C.L. & P.W. Local 102* v. *Lee Rubber and Tire Corp.,* 394 F.2d 362 (3rd Cir. 1968), (issue of whether payments to fund by employer were still required during strike, held arbitrable).

[14] The Employee Retirement Income Security Act of 1974, as amended (ERISA) requires that an employee who has satisfied the one year service requirement (a twelve month period during which the employee has completed 1,000 hours of service, Sec.202(a)(3)(A) ERISA) commence participation in the *plan* no later than the earlier of (a) the first day of the first plan year beginning after the date on which he satisfied such requirements or (b) the date six months after the date on which he satisfied those requirements. Sec.202(a)(4)(A)&(B) ERISA, 29 U.S.C. §1052. *ERISA*, thus permits the exclusion of any employee who completes less than 1,000 hours of service during the twelve month period measured from his employment commencement date. The service requirement for contributions to the Pension Plan under the 1979 collective bargaining agreement here is 30 cumulative days of service within a 90 day period. (J.A.60).

(footnote continued on next page)

Arbitration will also achieve the objectives of judicial economy and restraint, by either resolving a party's grievance or by settling underlying factual disputes prior to the district court taking jurisdiction to enforce the rights of the Trustees. *See Barrentine* v. *Arkansas-Best Freight System,* 450 U.S. 728, 746-753 (1981) dissent. Burger, C.J. joined by Rehnquist, J.[13]

The Court of Appeals decision, if allowed to stand, has far reaching and serious consequences to the district courts who will have to hear these cases. During oral argument before the district court, counsel for the Trustees stated that he had filed some eighty cases on behalf of the Trust Funds in the Eastern

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(footnote 14 continued)

The employee then becomes a participant in the Pension Plan (if still employed) 180 days after the first day he became employed. (J.A. 78). As applied to the 1979 collective bargaining agreement, ERISA permits the exclusion of "part time", "temporary" or "emergency" employees. (J.A.79). Applying the generous definition of a regular employee [defined in terms of service requirements] the arbitrator in considering the "law of the shop" and the intent of the parties as to who are "part time", "temporary" or "emergency" employees cannot reach a decision which would violate any ERISA right of an employee included in the collective bargaining unit.

Obviously, the same is true with regard to disputes over contributions to the Health and Welfare Plan, for it is not subject to participation and vesting rules created by ERISA. Sec. 201 of ERISA, 29 U.S.C. §1051.

[13] The "... federal courts [are] flooded by litigation increasing in volume, in length, and in a variety of novel forms..." *Barrentine,* 450 at 748. In the two years that have lapsed since *Barrentine,* this flood has continued. Civil cases filed in 1981 increased to 180,576, up 7% from 1980. In 1982 the record was set at 206,193, up 14.2% from 1981. The number of cases per judge has increased dramatically. In 1960, the ratio was 242:1, in 1980, 327:1, in 1981, 350:1 and in 1982, 400:1. The number of cases pending in the district courts has continued to grow. As of June 30, 1982, there were 205,434 civil cases pending, an 8.9% increase from the previous 12 month period. Most importantly, the number of cases filed under the labor statutes rose 10%, from 9300 in 1981 to 10,288 in 1982. Annual Report of the Director, Administrative Office of U.S. Courts 3-4 (1982). Compare with *Barrentine,* 450 at 748 n.1.

District of Missouri alone, each involving alleged delinquent contributions and presenting questions of interpretation of the underlying bargaining agreements. One may presume a similar number of cases have been filed by these and other trustees representing multiemployer funds throughout the country.

Given the typical nature of the disputes in this case, it cannot be said that the interest of the parties, or the judicial system, will best be served by "employing the cumbersome, time-consuming, and expensive process of litigation" in the federal courts when there exists the reasonable alternative of arbitration. *Barrentine, Id.* at 748.

III. DEFERRAL TO ARBITRATION IS CONSISTENT WITH CONGRESSIONAL INTENT AND THE NATIONAL EMPLOYEE BENEFIT POLICY.

The prior discussions establish that the opinion of the Eighth Circuit is contrary to the traditional precepts of contract law and would seriously undermine national labor policy supporting arbitration. The Court of Appeals recognized these problems, but took the position that the rights and responsibilities of fiduciaries were of greater concern. The opinion effectively subordinated the policy considerations of federal labor law to what the court perceived to be the conflicting and superior dictates of national policy in the field of pension and health and welfare regulation. This portion of the brief will focus on that policy, and the statutes in which the policy is expressed, to demonstrate that no such conflict exists. There is, in short, no contrary statutory or policy consideration which overcomes the duty to arbitrate.

A. No Fiduciary Duty Will Be Compromised By Deferral To Arbitration.

Trustees of employee benefit funds are primarily charged to administer such funds for the sole benefit of participants and beneficiaries. This principle is found in Sec. 302(c)(5)LMRA, 29

U.S.C. §186(c)(5) (1978 & Supp. 1983), the Employee Retirement Income Security Act of 1974 (ERISA), the Multiemployer Pension Plan Amendments Act of 1980, (MPPAA), and the Court's decision in *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981). This statutory and common law fiduciary duty, however, does not warrant the conclusion that the attempt of the Trustees in this case to litigate the meaning and application of the collective bargaining agreement is within the scope of their administrative duties.

In *Amax Coal Co.*, the Court rejected the employer's contention that management-appointed trustees (Sec. 302(c)(5) LMRA) were the representatives of the employer for "purposes of collective bargaining or adjustment of grievances", within the meaning of Sec.8(b)(1)(B) NLRA as amended by LMRA, 29 U.S.C. §158(b)(1)(B) (1973). Unlike unions and employers, trustees simply do not engage in collective bargaining and adjustment of grievances. Pertinent to defining the scope of trustees' duties, the Court stated:

> The management-appointed and union-appointed trustees do not bargain with each other to set the terms of the employer-employee contract; they neither require employer contributions not required by the original collectively-bargained contract, nor compromise the claims of the union or the employer with regard to the latter's contributions. Rather, the trustees operate under a detailed written agreement, 29 U.S.C. §186(c)(5)(B), which is itself the product of bargaining between the representatives of the employees and those of the employer.

Id. at 336.

Under *Amax Coal Co.*, it is clear that to allow trustees the right to initiate litigation without submitting underlying collective bargaining disputes to arbitration would significantly expand their authority beyond that allowed by statute or by the bargaining agreements.

Other indications of the limits of trust administration can be found in cases brought by fund trustees seeking court appointment of an umpire to break a deadlock between the employer and employee trustees in the administration of Sec. 302(c)(5) LMRA employee benefit plans. Four Circuit Courts of Appeals have considered what constitutes trust administration deadlock.

The Second Circuit has interpreted administration to include all issues which the trustees have authority under the trust agreement to decide. *Mahoney* v. *Fisher,* 277 F.2d 5 (2d Cir. 1960); *Barrett* v. *Miller,* 276 F.2d 429 (2d Cir. 1960); and *Singleton* v. *Abramson,* 336 F.Supp. 754 (S.D.N.Y. 1971).

The Tenth Circuit has held that administration is limited to the practical and ordinary matters of day to day administration of the plans. *See, Ader* v. *Hughes,* 570 F.2d 303 (10th Cir. 1978), holding the decision to amend the plan is not a matter of ordinary trust administration, and *Bath* v. *Pixler,* 283 F.Supp. 632 (D.Col. 1968), holding the decision to terminate the plan is a legal controversy and not a dispute over practical administration of the plan.

The Ninth Circuit has decided the issue on a case by case basis. In *Hawkins* v. *Bennett,* 704 F.2d 1157 (9th Cir. 1983), the court determined that it was appropriate to appoint an umpire to resolve a dispute among the trustees involving whether to increase benefits under the trust plan, finding the dispute to be a matter within their trust administrative authority.

Finally, the Eighth Circuit, in *Farmer* v. *Fisher,* 586 F.2d 1226 (8th Cir. 1978),[16] reversed the district court's order appointing an arbiter to break a trustee deadlock over whether to sue an employer for failing to make contributions to the funds while the union was on strike. In reaching its decision, the court first noted that the refusal of the employer to make contributions

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[16] *Overruled by the Court of* Appeals majority in its opinion below. (Prosser Pet. Cert. A.1).

was the event giving rise to the dispute. The court found the issue of whether contributions were owed depended on interpretation of the collective bargaining agreement which (as in the present case) specified the sums and criteria for payment. While noting that the mere origination of a dispute in the collective bargaining agreements does not, in every case, preclude its characterization as a matter of trust administration, the court held that disputes involving the interpretation of the collective bargaining agreement fall into the category of extraordinary matters not intended to be included in trust fund administration. *Farmer* v. *Fisher* is factually analogous to the present case, and its reasoning is applicable here.

Even if the Court were to adopt the broad definition of trust administration as applied by the Second Circuit, the result would be the same. Looking only at the trust documents, it cannot be reasonably argued that the trustees have authority to seek an audit and contributions on behalf of *all* of Prosser's employees working in the collective bargaining unit where the trust documents themselves do not provide such broad authority.

The Trustees in their complaint allege that Prosser had breached the terms of the trust and collective bargaining agreements by failing to allow the Trustees to conduct a "proper audit." (J.A. 46) The Trustees prayed that an "account be taken as to *all* employees of Defendant covered by the Collective Bargaining Agreement, ... covering the periods for which the collective bargaining agreements are effective." (J.A. 48, emphasis added).

The limitation on the power of the Trustees to conduct an audit under these very trust documents was decided by the Eighth Circuit in *Central States Southeast and Southwest Funds* v. *CRST, Inc.*, 641 F.2d 616 (8th Cir. 1981).[17] In that case the

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[17] Overruled by the Court of Appeals majority in its opinion below. (Prosser Pet. Cert. A.1).

trustees asserted a similar right to inspect all the records of CRST's employees, including employees not covered by the bargaining agreement. As in the instant case, the trust document limited the trustees' authority to audit records kept on those employees (1) covered by the collective bargaining agreement and (2) upon whose behalf the employer is required to make contributions. (J.A. 16 & 22). The court refused to rewrite the agreement to provide a greater right of inspection than that specifically allowed under the trust indentures, holding:

> ERISA does not expand the right of inspection beyond that contractually agreed to. The fiduciary obligations mandated by ERISA are owed only to participants and beneficiaries. 29 U.S.C. §1104. Participants are those employees who are or who may become eligible to receive a benefit from an employee benefit plan. 29 U.S.C. §1002 (7). Non-covered employees, that is, those employees who are not "employed under the terms and conditions of a Collective Bargaining Agreement" neither are nor can be participants or beneficiaries. The district court correctly held that employee coverage is to be determined solely under the provisions of the collective bargaining agreements. Absent such determination, the Funds have no right, express or implied, to have access for audit purposes to *all* employee records. [footnote omitted]

641 F.2d at 619.

A similar conclusion was reached in *Central States Southeast and Southwest Funds* v. *Central Transport Inc.*, 698 F.2d 802 (6th Cir. 1983), *petition for cert. pndg.* The court, again reviewing the same trust documents as in this case, held that the agreements did not authorize the trustees to inspect the records of all employees. The trustees were only authorized to audit the records of "covered" employees and the records of particular employees whom the trustees had reasonable cause to believe were "covered" by the collective bargaining agreement. The court held that the trustees' decision to audit the records of all

employees was arbitrary, capricious and, therefore, beyond the scope of their administrative duties.

As in *CRST* and *Central Transport,* the Trustees, on the face of these trust agreements, are not entitled to the relief sought in their complaint. If the Trustees have a right greater than that provided for in the trust instruments, it is not derived from the law, but from an interpretation and application of the collective bargaining agreements. Deferral to arbitration of the Trustees' claimed right to a broader audit will in no way compromise the right of the Trustees to remain independent of the Union or Prosser. Even the Union's refusal to arbitrate will not deprive the Trustees of the rights conferred on them by the trust agreements.

The opinion of the Court of Appeals majority in this case makes the assumption that trustees have a fiduciary duty to litigate disputes, even those involving collective bargaining questions. It concludes that these Trustees, therefore, must have the right to initiate litigation. According to the court's reasoning, holding trustees liable for benefits to persons for whom no contributions were made would place trustees in an untenable position if they had to rely on the union to arbitrate their rights.

To reach this conclusion the majority cites the case of *Rosen* v. *Hotel and Restaurant Employees,* 637 F.2d 592 (3rd Cir. 1981). Rosen, a retired employee, sued his union and pension fund for pension benefits under a collective bargaining agreement. The fund refused Rosen's request for benefits, stating he did not have the required years of credited service because his employer failed to make contributions for some years of his employment. The Third Circuit held that Rosen was entitled to a pension because the trustees breached their fiduciary duty by not notifying him that his pension was in jeopardy due to his employer's failure to make contributions. The court held that the union and the trustees were under a fiduciary duty to take some action against the employer who failed to contribute to the fund, such as commencement of a suit or picketing a non-contributing employer.

The Eighth Circuit contrasted this liability of trustees with the limitation on direct initiation of litigation in *Howard Martin,* 625 F.2d 171 (7th Cir. 1980), and concluded: "...[i]t seems that the trustees of Taft-Hartley pension funds are in danger of being whipsawed by the decisions in *Rosen* and *Howard Martin.* In the Third Circuit they are under a probable duty to sue for delinquent contributions, and in the Seventh Circuit they are prevented from doing so in many cases." (Prosser Pet.Cert. A. 16).

The concern expressed by the Eighth Circuit is not borne out by an analysis of the cases, however. The *Rosen* holding is completely compatible with the *Howard Martin* analysis permitting suits by trustees in "simple collection actions". In *Rosen,* the employer's duty to contribute to the pension fund was undisputed and, thus, a "simple collection action" which could be maintained by the trustees without deferring to the union to prosecute a grievance.

Furthermore, any concern for the trustees being "whipsawed" by having to defer litigation to arbitration as envisioned in *Howard Martin* is allayed by the holding in *Adams* v. *Gould, Inc.,* 687 F.2d 27 (3rd Cir. 1982). In *Adams,* employees sued their employer claiming a breach of the pension plan and the trustees claiming a breach of fiduciary duty. The Third Circuit dismissed the complaint and held that previous arbitration and settlement of the same disputes between the employer and the union under the provisions of the collective bargaining agreement were binding on the employees and that the issues could not be relitigated by suit against the employer and/or trustees. Thus, as applied to the present case, if the Union and Prosser resolve the underlying contract disputes by adherence to the grievance and arbitration procedure, the Trustees will be insulated from that liability which troubled the Eighth Circuit and lead to the decision now before the Court.

The Trustees have no independent right to invoke the arbitration provisions under the collective bargaining agreements. The district court acknowledged this fact and adopted the procedures suggested in *Howard Martin*: the Trustees need only inform the Union and ask it to file a grievance against Prosser in order to resolve these disputes.

The Eighth Circuit Court of Appeals majority questioned whether the Union will act readily at the request of the Trustees. The court reasoned that, because the Union may not arbitrate claims perceived by the Trustees to be a breach of the collective bargaining agreements, the Trustees should have a right to initiate litigation. (Prosser Pet. Cert. 16-18). The fear that the Union will not pursue the underlying pension and welfare contribution claims when requested is pure speculation. It is a factual issue which cannot be resolved by the record in this case because the Trustees have not made any such request. Unless and until the Trustees ask the Union to act, it cannot be said that the grievance and arbitration provision of the collective bargaining agreements is inadequate to settle the disputes and protect the interest of the Trustees. *Republic Steel Corp.* v. *Maddox*,. 379 U.S. 650, 653 (1965); *Vaca* v. *Sipes*, 386 U.S. 171, 184 (1967).[11]

If the Union is requested and decides to arbitrate the dispute, it cannot be presumed that it will do so in a perfunctory or negligent manner. It must be presumed that the Union will faithfully carry out its statutory duty of fair representation and its duty to enforce the terms of the collective bargaining agreement. *Vaca* v. *Sipes, supra; Humphrey* v. *Moore*, 375 U.S. 335 (1964). To presume otherwise seriously undermines the national labor policy placing confidence in the union to fairly represent

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[11] The Trustees have not suggested nor pled that it would be futile to request the Union to arbitrate the disputes. *See, e.g., Glover* v. *St. Louis-San Francisco Railway Company*, 393 U.S. 324 (1969).

its members. Neither the history of the labor movement, nor the actions of the Union in this case warrant such a radical presumption.

In addition to the fact that the Union has a primary interest and purpose in enforcing the terms of the collective bargaining agreement, the Union is under a "statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca* v. *Sipes, supra* at 177. Should the Union refuse to "take an arguably meritorious pension and welfare claim" to arbitration, in our litigious society, it would most certainly expose itself to a claim of unfair representation and substantial liability. *See, e.g., Bowen* v. *United States Postal Service,* 103 S.Ct. 588 (1983). By exposing both the Union and Prosser to costly litigation and substantial liability, pressure is placed on the parties to make full use of the contractual provisions for settling disputes by arbitration. *Hines* v. *Anchor Motor Freight, Inc.,* 424 U.S. 554 (1976).

Should the Union refuse to arbitrate, or do so in a perfunctory or negligent manner, the interests of the Trustees and the Funds, and the beneficiaries, are adequately protected by their right to sue. Additionally, if there is any reasonable basis for believing that Prosser has failed to report or contribute for any covered employee, the Trustees can seek the assistance of the Secretary of Labor to investigate and make findings available to the Trustees. Sec. 504 ERISA, 29 U.S.C. §§1134(A)(1) & (2) (1975). Further, criminal sanctions are available should the employer knowingly fail to disclose facts required by ERISA to be published or certified to the administrator of the trust plans. 18 U.S.C. §1027; *Central States Southeast and Southwest Funds* v. *CRST,* 641 F.2d 616 (8th Cir. 1981).

The Trustees' interests are also protected by the reasonable expectations of the law. The law does not command trustees to bring suit or take other action which is neither within the scope

of their authority nor reasonable or prudent. *Central States Southeast and Southwest Funds* v. *Central Transport,* 698 F.2d 802, 806 (6th Cir. 1983). While a trustee is exposed to liability for failing to act with care, skill, prudence and diligence, its actions are not a matter of strict liability. The law will review the conduct of the trustee to determine only if it is arbitrary or capricious. *See, e.g. Bueneman* v. *Central States Southeast and Southwest Funds,* 572 F.2d 1208 (8th Cir. 1978). Even in the event the Trustees are unsuccessful in compelling the Union to prosecute these arbitral disputes, the Trustees shall have acted with due care, skill, prudence and diligence. Clearly, then, the Trustees could not be held liable for failing to fulfill their fiduciary duties.

B. Deferral To Arbitration Complements The Goals Of ERISA.

From the 1940's to the mid-1970's private pension and welfare plans flourished in the United States.[19] Aware of the achievements of the private pension system, Congress sought to encourage its healthy growth. After years of consideration and debate, Congress passed the Employee Retirement Income Security Act of 1974, (ERISA) 29 U.S.C. §§1001-1381 (1975). Congress set forth the purpose of the Act as follows:

> It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with

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[19] In 1974, Congress estimated that the number of employees covered by pension plans was between 23 and 30 million, as compared to 9.8 million in 1950, and 4 million in 1940. It was estimated that by 1980 the number would climb to 42.3 million. H.R.Rep.No. 93-807, 93 Cong., 2d Sess. 9, *reprinted in* [1974] U.S.Code Cong. & Ad. News 4670, 4678.

> respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

Sec. 2(b) ERISA, 1974, 29 U.S.C. §1001(b) (1975). (A.3)

Congress sought to protect the interests of employees and beneficiaries not by establishing a guaranteed right to benefits nor by regulating the collective bargaining process, but by setting minimum standards assuring the equitable character of the plans and regulating the administration of employee benefit funds.

Pursuant to the National Labor Relations Act (NLRA), the union is charged with the duty to collectively represent its members in bargaining "...in respect to rates of pay, wages, hours of employment or other conditions of employment...." Sec. 9(a) NLRA, 29 U.S.C. §159(a) (1973). Employee benefits have been held to be "mandatory" subjects of bargaining, falling within the statutory command to negotiate "wages" and "conditions of employment". Sec. 8(a)(5), NLRA, 29 U.S.C. §158(a)(5); *Inland Steel Company* v. *NLRB,* 170 F.2d 247 (7th Cir. 1948); *cf. Allied Chem. Workers* v. *Pittsburgh Plate Glass Co.,* 404 U.S. 157 (1971).

ERISA left undisturbed this duty of labor and management to bargain regarding employee benefits. Doing so was not simply a reaffirmation that the interests of the union worker were adequately protected by the requirement of the NLRA for the union and employer to bargain in good faith with respect to

employee benefits.[20] But, further, this forebearance by Congress was recognition of the fact that, if not tampered with, the collective bargaining process would promote the expansion of employee benefits beyond the minimum requirements set forth in ERISA. Thereby, Congress' purpose of encouraging the growth and maintenance of the private employee benefit system would be achieved and, at the same time, the purpose of the labor laws to foster good faith bargaining and peaceful resolution of disputes would be accommodated.

The duties of the parties to abide by the terms of the collective bargaining agreement and police the enforcement of its terms are explicit. In the event of disagreement as to the meaning and application of the agreement, the parties, necessarily, have the corollary right to agree upon an exclusive method for the settlement of such disputes. Sec. 203(d) LMRA, 29 U.S.C. §173(d) (1978); *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965). It would be an anomaly for Congress to have intended that the union and employer bargain for employee benefits, and, at the same time, deprive the union and employer the right to settle disputes over the meaning of their bargain during the term of the agreement.

There is nothing in either the legislative history, or the statute itself, to indicate an intent by Congress to abrogate the right of the union and employer to bargain collectively and contractual-

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[20] Section 1011(b)(2) of ERISA, 26 U.S.C. §410(b)(3), provides for the exclusion of union members in determining whether a pension plan for other employees of the same employer meets the minimum participation standards of the law. Congress explained the reason for the exclusion of union members was to relieve a hardship created on non-union employees. Congress recognized the inherent protections of the collective bargaining process to guard against discriminatory treatment of union members and left to the discretion of bargaining representatives the decision whether to bargain for pension benefits or current compensation. H.R.Rep.No.93-807, 93 Cong. 2d Sess. 44-45, Reprinted in [1974] U.S.Code Cong. & Ad. News 4670, 4714-4715.

ly bind all parties to a method by which disputes as to the meaning of the agreement are to be resolved.

To the contrary, Section 514(d) of ERISA, 29 U.S.C. §1144(d) (1975) declares:

> Nothing in this [Act] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States...or any rule or regulation issued under any such law.(A.5)

Clearly, ERISA did not alter, amend, or impair the National Labor Relations Act, the Labor Management Relations Act, or any common law rule or federal labor policy developed by the judiciary.

The Trustees have sued Prosser, claiming a breach of the collective bargaining agreements. In doing so, they assert a right to initiate direct litigation, despite the agreement by the parties to settle the type of interpretative disputes raised in the Trustees' complaint by arbitration. The Trustees claim a right to circumvent the terms of the contracts, and vitiate the promises of the parties, by alleging district court jurisdiction under Sec. 502 (a)(3) of ERISA, 29 U.S.C. §1132(a)(3)(1975). That section provides:

> (a) a civil action may be brought—
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> * * *
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this subchapter or the terms of the plan. (A.3)

The Trustees' complaint charges violations of both the collective bargaining agreements and duties under the trust indentures. It contains no allegations that Prosser violated any provi-

sion of ERISA. The district court deferred litigation on the claimed violations of the trust indentures, finding those claims to be inseparable from the claims relating to Prosser's breach of the collective bargaining agreements. The court properly exercised its discretion by deferring all litigation pending the resolution of the underlying contract disputes between Prosser and the Union. The court's order was reasonable because it assured the orderly, efficient and proper handling of the Trustees' claims.

ERISA's legislative history is silent on the requirement that trustees defer to the rights of the union and employer to interpret the collective bargaining agreement by arbitration. Congress, in its Joint Explanation Statement on ERISA, referred only to the authority of participants and beneficiaries to enforce their rights against the trustees. H.R.Rep. No. 93-1280, 93d Cong., 2d Sess. 326-27, *reprinted in* [1974] U.S.Code Cong. & Ad. News 5038, 5106-5107. Likewise, the right of "ready access to the Federal courts" refers only to the rights of participants and beneficiaries. Sec. 2(b), ERISA, 29 U.S.C. §1001(b) (1975).

The text of ERISA does not mention the doctrine of exhaustion of contractual remedies as a condition precedent to institution of suit. However, in enacting ERISA Congress "intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." 120 *Cong. Rec.* 29942 (1974) (remarks of Sen. Javits). Further, the intent was that actions brought under Sec. 502 "are to be regarded as arising under the laws of the United States in similar fashion to those brought under Section 301 of the Labor-Management Relations Act of 1947." H.R.Rep. No. 93-1280, 93d Cong., 2d Sess. 258 & 327, *reprinted in* [1974] U.S.Code Cong. & Ad. News 4639, 5038 & 5107.

Congress' reference to Section 301 of the LMRA has been judicially interpreted to mean that Congress intended that beneficiaries and participants seeking enforcement of their rights under Section 502 of ERISA must first exhaust intra-

contractual remedies.[21] *See, e.g., Kross* v. *Western Electric Co.*, 701 F.2d 1238 (7th Cir. 1983); *Challenger* v. *Local Union No. 1 of International Bridge*, 619 F.2d 645 (7th Cir. 1980); *Amato* v. *Bernard*, 618 F.2d 559 (9th Cir. 1980); *Adams* v. *N. J. Brewery Employees' Pension Trust Fund, etc.*, 670 F.2d 387 (3rd Cir. 1982); *Air Line Pilots Assn.* v. *Northwest Airlines*, 627 F.2d 272 (D.C. Cir. 1980). The right of the Trustees to sue on behalf of participants and beneficiaries is no greater than the rights of the participants and beneficiaries to bring suit on their own behalf. Thus, a rule requiring the Trustees to await suit pending arbitration of the underlying collective bargaining disputes will not frustrate the intent and purpose of ERISA.

The decision of the Court of Appeals majority allows the Trustees to bypass arbitration, and litigate directly with Prosser the meaning of the collective bargaining agreements. This decision frustrates the intent of Congress to allow the bargaining parties to resolve contract disputes exclusively by the method chosen by the parties. It threatens the efficacy of the collective

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[21] The rule requiring beneficiaries and participants to exhaust contractual remedies prior to instituting suit under Sec. 502, is further premised on the reasoning that: (1) the procedure will reduce frivolous lawsuits; (2) it will promote consistent treatment of claims; (3) it will promote a non-adversarial method of claims settlement; and (4) it will minimize the costs of claims settlement for all concerned. *See, e.g., Amato* v. *Bernard*, 618 F.2d 559, 567 (9th Cir. 1980)

This rationale is equally applicable to a rule requiring arbitration in cases of disputes involving contract interpretation prior to bringing suit by trustees under Sec. 502 of ERISA. As above, (1) the union and employer will sift out frivolous claims based on misinterpretation of the collective bargaining agreement by trustees; (2) the union and employer will be able to settle on an interpretation of the agreement which will be binding on all parties; (3) arbitration will promote a peaceful method for dispute settlement; and (4) the settlement of contract disputes by arbitration will minimize the costs to all parties and possibly save the funds from having to pay the costs and the employer's attorney fees if unsuccessful in their litigation. Sec. 502(g)(1) ERISA, 29 U.S.C. §1132(g)(1), as amended, 1980.

bargaining process, and undermines the intent of Congress to foster the growth of multiemployer pension plans, in particular. See, Sections (3)(c)(2) and (3)(c)(3) of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §1001a(c)(2) & (3) (Supp. 1983). *See also, NLRB* v. *Amax Coal,* 453 U.S. 322 (1981). These disastrous results cannot be justified by the requirement to protect the Trustees and the Funds from the control of the union and employer when, as in this case, the disputes to be settled involve eligibility conditions which far exceed the minimum requirements of ERISA and are contained in the collective bargaining agreements. *See, United Mine Workers of America Health & Retirement Funds* v. *Robinson,* 455 U.S. 562 (1982).

In sum, reversal of the Court of Appeals majority decision in this case will produce the following results: (1) it will preserve the rights of the employer and the union under LMRA Sec. 203(d) to arbitrate and resolve the underlying contractual disputes in accord with the collective bargaining agreement; (2) it will properly define the role of trustees in administering Sec. 302(c)(5) LMRA benefit funds; and (3) it will complement the intent Congress expressed in ERISA to promote employee benefit funds.

C. Nothing In The Multiemployer Pension Plan Amendments Act Conflicts With Deferral To Arbitration.

Approximately six months after the filing of the Trustees' complaint, the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) became law. The Act added Section 515 to ERISA, 29 U.S.C. §1145, which provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement. (A.5)

The Court of Appeals majority relied on Section 515 and quoted, from the decision in *Kaiser Steel Corp.* v. *Mullins,* 455 U.S. 72 (1982), a passage from the legislative history of the new section:

> The provision which was eventually enacted as [§515] was added to S. 1076 by the Senate Committee on Labor and Human Resources. The Committee explained that the provision was added because "simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses *unrelated* to the employer's promise and the plans' entitlement to contributions," and steps must be taken to "simplify delinquency collection." Senate Committee on Labor and Human Resources, S. 1076—The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration, 96th Cong., 2d Sess., 44 (Comm. Print, Apr. 1980) (1980 Senate Labor Committee Print) (emphasis added). During floor debate, Senator Williams and Representative Thompson explained the purpose and meaning of [§515] in the same language used in the Senate Labor Committee Print.

Id. at 87. (Prosser Pet.Cert. A.12-13)

The Court of Appeals was struck by the reference to the phrase "simple collection actions" in the legislative history and the use of the term in the *Howard Martin* case. The suggestion in the Eighth Circuit's decision that Congress implicitly disapproved of the *Howard Martin* decision is inaccurate, for the Committee action occurred before *Howard Martin* was decided. Had Congress disapproved the reasoning of *IBEW* v. *Dave's Electric Service, Inc.,* 382 F.Supp. 427 (M.D.Fla. 1974), or referred favorably to *Wishnick* v. *One Stop Food & Liquor Store, Inc.,* 359 F.Supp. 239 (N.D.Ill. 1973), then the Court of Appeals might have been on more solid ground. However, not one of the cases cited by the legislators, approvingly or otherwise, dealt with the issue of exhaustion of the grievance and ar-

bitration provision of a collective bargaining agreement before instituting suit.[22]

Section 515 does not govern the present case. The Trustees' suit is not a simple action brought to collect delinquencies. The Trustees do not assert that delinquencies exist. They seek, instead, an accounting for all employees from 1976 through 1982, regardless of whether any contribution was required on behalf of all such employees. They, thereby, raise issues which require an interpretation of the collective bargaining agreements. The district court sought to simplify the Trustees' claims by deferring to the expertise of an arbitrator to determine the collective bargaining disputes. The order of dismissal was completely compatible with the objectives of Sec. 515.

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[22] The following cases were cited with approval:

Lewis v. *Benedict Coal Corp.*, 361 U.S. 459 (1960), holding an employer has no right to set off damages (caused by the union's breach of the contract) against contributions admittedly owed to the trust funds, in the absence of unequivocal language to the contrary; *Lewis* v. *Mills Ridge Coals, Inc.*, 298 F.2d 552 (6th Cir. 1962), holding that an employer could not defend against a trustees' suit for contributions to the trust fund based upon failure of consideration resulting from the trustees' misconduct; and *Huge* v. *Long Hauling Company, Inc.*, 590 F.2d 457 (3rd Cir. 1978), precluding the employer from raising an anti-trust defense to trustees' request for preliminary injunction.

The following cases were cited with disapproval:

Western Washington Laborers Employees Health and Security Trust Fund v. *McDowell*, 103 LRRM 2219 (W.D.Wash. 1979) and *Washington Area Carpenters Welfare Fund, et al.* v. *Overhead Door Co.*, 488 F.Supp. 816 (D.C.Wash. 1980), holding an employer was allowed to defend against a trustees' suit for collection of delinquent contributions on the basis of alleged unenforceability of a pre-hire agreement. *Carpenters Welfare Fund, etc., Id., rev'd on other grounds,* 681 F.2d 1 (D.C. Cir. 1982).

The collective bargaining agreements require the prompt resolution of disputes involving the meaning and application of the contracts, and arbitration will generally result in resolution of the disputes more promptly than rushing to the crowded courtroom.[23] *Central States Southeast and Southwest Areas Pension Fund* v. *Howard Martin,* 625 F.2d 171, 173 (7th Cir. 1980) Use of arbitration not only respects the rights of the parties to agree upon an exclusive remedy to resolve their disputes, it also simplifies collection suits brought by trustees by narrowing the issues to be litigated. In many cases, arbitration can settle the claims of trustees and a law suit would then be unnecessary.

Even assuming Sec. 515 is applicable and relevant to the present case, neither its text nor its legislative history suggests that the Trustees are permitted to institute suit against Prosser and circumvent the arbitration requirement of the collective bargaining agreement. Section 515 did not repeal "...the labor laws, and any other statute which might be raised as a defense to a provision in the collective bargaining agreement requiring an employer to contribute to a pension fund...and nowhere in the legislative history is there any mention that [§515] might conflict with other laws." *Kaiser Steel Corp.* v. *Mullins,* 455 U.S. 72, 88 (1982). As analyzed by Justice White, Rep. Thompson and Sen. Williams "...did not say that employers should be prevented from raising all defenses; rather, they spoke in terms of 'unrelated' and 'extraneous' defenses." *Id.*

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[23] Under the 1979-1982 collective bargaining agreement, for example, the decision to arbitrate a dispute will be made within forty-four days of the filing date of the grievance. (J.A. 55-56).

CONCLUSION

For the above stated reasons, petitioner respectfully requests that the Court reverse and vacate the order of the Court of Appeals for the Eighth Circuit, and reinstate the order of the District Court dismissing the complaint without prejudice.

Respectfully submitted,

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APPENDIX

APPENDIX

STATUTES INVOLVED

Act of June 23, 1947, 61 Stat. 153, Section 203(d), 29 U.S.C. §173(d).

Functions of Service

(d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

* * *

Act of June 23, 1947, 61 Stat. 156, Section 301(a), 29 U.S.C. §185(a).

Suits by and against labor organizations
Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * *

Act of June 23, 1947, 61 Stat. 157, as amended, Sec. 302(c)(5) 29 U.S.C. §186(c)(5).

Restrictions on financial transactions

(c) Exceptions

The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such

payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; . . .

Act of Sept. 2, 1974, 88 Stat. 832, as amended, Section 2(b), 29 U.S.C. §1001(b).

Congressional findings and declaration of policy

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

* * *

Act of Sept. 2, 1974, 88 Stat. 891, Section 502 as amended by an Act of Sept. 26, 1980, 94 Stat. 1295, Section 306(b), 29 U.S.C. §1132.

Civil enforcement

Persons empowered to bring civil action

(a) A civil action may be brought—

. . .

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

. . .

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

Act ofSept. 2, 1974, 88 Stat. 897, as amended, Section 514(d), 29 U.S.C. §1144(d).

Other laws

. . .

Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of United States prohibited

(d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of the title) or any rule or regulation issued under any such law.

Act of Sept. 26, 1980, 94 Stat. 1295, Section 515, 29 U.S.C. §1145.

Delinquent contributions

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.